

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROSELIND QUAIR & CHARLOTTE
BERNA,

Petitioners,

v.

MIKE SISCO, ELMER THOMAS, KEVIN
THOMAS, DENA BAGA, ELAINE JEFF,
PATRICIAL DAVIS, and DOES 1
through 50, inclusive,

Respondents.

No. 1:02-CV-5891 DFL

Memorandum of Opinion
and Order

This case arises from the decisions by the General Council of the Santa Rosa Rancheria Tachi Indian Tribe ("the Tribe") to banish and disenroll petitioners Roselind Quair and Charlotte Berna ("petitioners"). Petitioners contend that the banishment and disenrollment decisions violate the Indian Civil Rights Act ("ICRA") because petitioners were denied various procedural protections available in federal and state courts. The Tribal Business Committee members of the Santa Rosa Rancheria Tachi Indian Tribe ("respondents") take the position that ICRA does not override tribal sovereignty, which includes the right of the Tribe to follow its own traditional adjudicatory procedures in

1 banishment and disenrollment proceedings. Both petitioners and
2 respondents now move for summary judgment. For the reasons
3 below, the court DENIES petitioners' motion and GRANTS
4 respondents' motion on petitioners' claims relating to
5 disenrollment only.

6 I.

7 On October 2, 2000 the General Council of the Tribe
8 banished and disenrolled Quair and Berna after they hired an
9 attorney to sue the Tribe.¹ Quair's dispute arose out of her
10 allegation that a male tribal member sexually harassed her.
11 Berna's dispute had a more complex history. Berna had been the
12 Treasurer of the Tribe and in that capacity had initiated
13 disenrollment and banishment proceedings as against other
14 members of the Tribe. After Berna was removed from her position
15 as Treasurer, allegedly because of misuse of funds, she hired an
16 attorney to regain her office. Both Quair and Berna, acting
17 independently, hired the same attorney, a known opponent of the
18 Tribe, who then made a shrill demand on the Tribe on behalf of
19 both clients. The Tribe alleges that by hiring an attorney to
20 sue the Tribe, Berna and Quair threatened tribal sovereignty and
21 welfare.

22 In 2004, both parties moved for summary judgment. On July
23 26, 2004, Judge Robert E. Coyle, to whom this case was
24 originally assigned, granted in part and denied in part both
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28 ¹ The General Council consists of all adult members of the
Tribe.

1 motions.² Judge Coyle held that the court had habeas corpus
2 jurisdiction under ICRA to review the Tribe's decision to banish
3 Quair and Berna because: (1) banishment is criminal in nature;
4 (2) banishment constitutes detention; and (3) petitioners had
5 exhausted all available administrative remedies. Reviewing the
6 merits of the case, Judge Coyle found disputes of material fact
7 as to petitioners' due process and fair trial claims.³ Quair,
8 359 F.Supp. 2d at 967, 971-72.

9 Following Judge Coyle's order, on September 3, 2004,
10 respondents notified petitioners by certified mail that the
11 General Council would hold a rehearing to reconsider the Tribe's
12 earlier order of banishment and disenrollment. The letter
13 advised petitioners that at this hearing petitioners would have
14 the right to legal counsel and the right to present witnesses.
15 The letter also indicated that respondent Elmer Thomas would
16 testify and that petitioners would have the opportunity to
17 cross-examine him. Petitioners refused to attend, contending
18 that the rehearing still would violate ICRA because: "[the
19 hearing] was in front of the same decision making body—the
20 _____

21 ² Judge Coyle's opinion sets out in depth most of the
22 material facts relating to the case. See Quair v. Sisco, 359
23 F.Supp. 2d 948, 953-62 (E.D. Cal. 2004). Since that opinion,
24 and in response to it, the General Council held a rehearing on
25 October 1, 2004 to decide again whether to banish and disenroll
petitioners. The facts relating to that rehearing are set forth
below.

26 ³ Judge Coyle found that it was disputed whether: (1)
27 petitioners received notice of the charge against them; (2)
28 petitioners had notice that the General Council was considering
banishment and disenrollment; and (3) petitioners had the right
to confront hostile witnesses at the hearing. Quair, 359
F.Supp. 2d at 977-78.

1 General Council; the Tribe still lacked a formal judicial body
2 and any formal procedures; and the October 1, 2004 General
3 Council Meeting was a usurpation of the Federal Court's
4 authority to determine what constituted sufficient process under
5 the ICRA." (Pet'r. SUF 45.)

6 Despite the petitioners' absence, the General Council held
7 the rehearing on October 1, 2004. Some of the participants at
8 this hearing had attended and voted in the previous hearing. As
9 before, the hearing did not follow any codified adjudicatory
10 procedures. Moreover, the "customary" law that petitioners
11 purportedly violated—the law against disturbing the stability
12 and welfare of the Tribe—had not been reduced to writing in any
13 code, statute book or similar document.

14 The General Council voted on four issues: (1) whether
15 petitioner Berna should be banished; (2) whether petitioner
16 Quair should be banished; (3) whether petitioner Berna should be
17 disenrolled; and (4) whether petitioner Quair should be
18 disenrolled.⁴ After deciding to banish and disenroll both Berna
19 and Quair, the General Council memorialized its decision in four
20 resolutions, which the Bureau of Indian Affairs ("BIA")
21 subsequently approved.⁵

22
23 ⁴ While Berna had not lived on the reservation since 1970,
24 Quair lived on the reservation until she left one year after the
25 Tribe decided to banish her. The Tribe had not taken any
further steps to evict her.

26 ⁵ Resolution 2004-92 concludes: "NOW THEREFORE BE IT
27 RESOLVED, based upon the foregoing decision of the General
28 Council, Charlotte Berna is disenrolled from the Santa Rosa
Rancheria Indian Community Tachi Tribe."

Resolution 2004-93 concludes: "NOW THEREFORE BE IT
RESOLVED, based upon the foregoing decision of the General

II.

A. Respondents' Motion

1. Disenrollment

Respondents seek to distinguish banishment from disenrollment, arguing that the latter is not subject to federal habeas corpus review.⁶

ICRA guarantees to individual tribe members certain rights that are similar but not identical to those in the Bill of Rights and the Fourteenth Amendment. 25 U.S.C. §§ 1301-1303;

Council, Roselind Quair is disenrolled from the Santa Rosa Rancheria Indian Community Tachi Tribe."

Resolution 2004-94 concludes: "NOW THEREFORE BE IT RESOLVED, based upon the foregoing decision of the General Council, Charlotte Berna is banished from the Santa Rosa Rancheria Indian Community Tachi Tribe."

Resolution 2004-95 concludes: "NOW THEREFORE BE IT RESOLVED, based upon the foregoing decision of the General Council, Roselind Quair is disenrolled from the Santa Rosa Rancheria Indian Community Tachi Tribe."

⁶ Judge Coyle found that "disenrollment from tribal membership and subsequent banishment from the reservation constitute detention." Quair, 359 F.Supp. 2d at 971. But Judge Coyle's ruling does not govern the disenrollment of petitioners at the 2004 rehearing. Whether the court has habeas corpus jurisdiction to review the banishment and not the disenrollment of petitioners was not before Judge Coyle. In 2000, as opposed to after the rehearing in 2004, the General Council passed only one resolution sanctioning petitioners. That resolution ordered that petitioners be "immediately and permanently excluded" from the reservation and did not distinguish banishment from disenrollment. Because the disenrollment and banishment of petitioners were inseparable before the rehearing, Judge Coyle had no reason to consider whether the court had habeas corpus jurisdiction to review disenrollment separate from banishment.

Moreover, "[a] failure of subject matter jurisdiction is crucial and the lack of it may be raised at any time during the life of a lawsuit by either party or by the trial or appellate court on its own motion." 4 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1063 (2007).

1 Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 881-82
2 (2d Cir. 1996). In passing ICRA, Congress sought to achieve a
3 delicate balance between protecting the rights of individual
4 members and respecting tribal sovereignty. Santa Clara Pueblo
5 v. Martinez, 436 U.S. 49, 62 (1978). Therefore, Congress left
6 enforcement of ICRA mostly to tribal courts. ICRA allows
7 federal judicial review only by a petition of habeas corpus
8 under § 1303 and otherwise does not permit private federal
9 causes of action.⁷ Id. at 70. Petitioners seeking relief under
10 § 1303 must establish that: (1) the proceeding at issue is
11 criminal and not civil in nature; (2) the Tribe is detaining
12 them; and (3) they have exhausted all available tribal remedies.
13 Quair, 359 F.Supp. 2d. at 963. This statutory framework tightly
14 limits federal court review of tribal decisionmaking. In
15 interpreting § 1303, courts should hesitate to so expand the
16 meaning of "criminal" and "detention" such that, as a practical
17 matter, all tribal decisions affecting individual members in
18 important areas of their lives become subject to review in
19 federal court. Such a result would be inconsistent with the
20 principle of broad, unreviewable tribal sovereignty in all but
21 criminal cases involving physical detention.

22 Tribal membership determinations are not exempt from habeas
23 corpus review under § 1303 when the above three requirements are
24 met. See Poodry, 85 F.3d at 901 (concluding that petitioners
25 could challenge the tribe's decision to banish them and strip
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27 ⁷ Section 1303 provides: "The privilege of the writ of
28 habeas corpus shall be available to any persons, in a court of
the United States, to test the legality of his detention by
order of an Indian tribe." 25 U.S.C. § 1303 (2006).

1 them of their membership in federal court after finding that §
2 1303's requirements were met). But courts long have recognized
3 that the right to define its membership is central to a tribe's
4 "existence as an independent political community." Santa Clara
5 Pueblo, 436 U.S. at 72 n.32. Therefore, "the [federal]
6 judiciary should not rush to create causes of action that would
7 intrude on these delicate matters." Id. Because the Tribe's
8 disenrollment of Quair and Berna directly addresses tribal
9 membership, the court must exercise great caution in deciding
10 whether § 1303 applies to these decisions by the Tribe.

11 Although the question is not free from doubt, the court
12 finds that it lacks jurisdiction under § 1303 to review the
13 Tribe's decision to disenroll petitioners from membership in the
14 Tribe in the circumstances of this case. The Tribe's 2004
15 decisions to disenroll petitioners and to banish them were two
16 distinct, independent sanctions. The General Council
17 procedurally banished and disenrolled petitioners in separate
18 actions at the rehearing, taking four separate votes and
19 memorializing them in four separate resolutions. According to
20 the Tribe's submission, it may banish without disenrolling and
21 it may disenroll without banishing; the actions are not
22 synonymous. It follows that the court may review the Tribe's
23 disenrollment of Quair and Berna under § 1303 only if the
24 disenrollments, considered separately from banishment, meet §
25 1303's three requirements.

1 Here, the disenrollment of petitioners does not qualify as
2 detention under § 1303.⁸ For the purposes of habeas corpus, a
3 person is in detention or custody when severe restraints are
4 imposed upon the person's liberty. Hensley v. Municipal Court,
5 411 U.S. 345, 351 (1973). Over the years, courts have expanded
6 the scope of the term "custody" to cover "circumstances [that]
7 fall outside conventional notions of physical custody." Edmunds
8 v. Won Bae Chang, 509 F.2d 39, 40 (9th Cir. 1975); see also
9 Hensley, 411 U.S. at 351 (extending habeas corpus relief to
10 petitioner who was released on his own recognizance because the
11 state could restrict his freedom at any time); Jones v.
12 Cunningham, 371 U.S. 236, 242-43 (1963) (finding parolee
13 entitled to habeas corpus relief because his liberty of movement
14 was subject to various restraints imposed by the parole board).
15 But no court has applied habeas corpus review in cases where the
16 purported restraint does not limit the petitioner's geographic
17 movement. For example, a person cannot invoke habeas corpus
18 relief to challenge a fine. Moore v. Nelson, 270 F.3d 789, 791
19 (9th Cir. 2001) (finding that a petitioner cannot challenge an
20 \$18,000 fine levied by a tribe in federal court under § 1303);
21 Edmunds, 509 F.2d at 41 (finding that petitioner could not
22 invoke habeas corpus relief solely on the basis of a \$25 fine).
23 And while some courts have found that the denial of United
24 States citizenship is subject to federal habeas corpus review,
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27 ⁸ In contrast to other federal habeas statutes, such as 28
28 U.S.C. § 2254(a), § 1303 requires that petitioners be in
"detention" instead of in "custody." But courts have found that
§ 1303 is no broader than analogous federal habeas statutes.
See Poodry, 85 F.3d at 890.

1 the petitioners in those cases faced deportation upon losing
2 their citizenship. See, e.g., Ng Fung Ho v. White, 259 U.S.
3 276, 284 (1922); Espino v. Wixon, 136 F.2d 96, 98 (9th Cir.
4 1943). Accordingly, the court may review the disenrollment of
5 petitioners under § 1303 only if it similarly affects their
6 geographic movement.

7 Whereas courts have held that banishment, including a
8 stripping of tribal membership, constitutes detention, Poodry,
9 85 F.3d at 895-96, no court has held that disenrollment
10 independently constitutes detention. And here, petitioners have
11 failed to show that disenrollment, separate from banishment,
12 restricts their physical freedom in any way.⁹ While banishment
13 requires a person - whether a member of the Tribe or not - to
14 leave the reservation, disenrollment strips a member of tribal
15 membership and the tangible tribal benefits that attend upon
16 membership. 41 Am. Jur. 2d Indians; Native Americans § 17
17 (2006) ("Indian tribes have membership rolls for a variety of
18 reasons, most notably for the distribution of assets and
19 judgment funds in circumstances involving the distribution of
20 tribal funds and other property under the supervision and
21 control of the federal government.") In this case, all the
22 benefits are financial, such as monthly per capita payments that
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26 ⁹ Petitioners also fail to rebut the Tribe's contention
27 that, in the past, members have been disenrolled without
28 banishment and banished without disenrollment. As the
proponents of jurisdiction, petitioners bear the burden on this
issue.

1 come from the Tribe's gaming revenue.¹⁰ According to
2 respondents, nonmembers may live on the reservation, a point
3 that petitioners do not dispute.

4 Although they bear the burden on jurisdiction, petitioners
5 failed to address respondents' contention that disenrollment is
6 distinct from banishment in their written opposition. At oral
7 argument, petitioners contended that disenrollment was "worse"
8 than banishment because it stripped them of valuable benefits
9 and of their tribal identity. This misses the mark because the
10 jurisdictional issue is whether the tribal action amounts to
11 "detention," not whether it affects some other important
12 interest. Section 1303 grants federal courts jurisdiction to
13 review the "legality of [petitioner's] detention" and not
14 penalties that, while harsh, do not constitute detention.
15 Therefore, the court finds that § 1303 is simply inapplicable to
16 the disenrollment of petitioners.¹¹

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18 ¹⁰ Other membership benefits include: LEAP payments, Elder
19 benefits, health insurance, payment of burial expenses, semi-
20 annual bonuses, educational support, post-high school
21 scholarship programs, housing allotments, health care at the
22 Tribal health center, and hiring preferences for tribal members
23 for tribal employment.

24 ¹¹ Closer to the mark is petitioners' contention, advanced
25 at oral argument, that disenrolled individuals face a threat of
26 eviction amounting to an infringement on physical freedom. Some
27 courts have found that a person is in custody or detained when
28 facing a threat of physical restraint, including deportation or
eviction. But in those cases, the threat was imminent: the
government had the authority to place the person immediately in
jail without further decisionmaking. See Hensley, 411 U.S. at
351; Jones, 371 U.S. at 242. In contrast, petitioners here have
made no showing that the General Council can remove nonmembers
without taking another vote and making a new decision to remove
the nonmember.

1 Petitioners have the burden of establishing the court's
2 jurisdiction. Because petitioners have failed to show that
3 disenrollment affects their physical freedom to a degree that it
4 may be considered tantamount to detention, the court GRANTS
5 respondents' motion for summary judgment as to petitioners'
6 claims relating to disenrollment.

7 2. Banishment

8 While banishment constitutes detention, Quair, 359 F.Supp.
9 2d at 971, respondents argue in their motion that § 1303 is
10 inapplicable to petitioners' banishment claims because the
11 October 2004 rehearing mooted the entire case.

12 In the 2004 ruling, Judge Coyle refused to grant
13 petitioners summary judgment on their claims alleging a denial
14 of due process and denial of a fair trial because he found
15 disputes of material fact as to: (1) whether petitioners
16 received notice of the charge against them; (2) whether
17 petitioners had notice that the General Council was considering
18 banishment and disenrollment; and (3) whether petitioners had
19 the right to confront hostile witnesses at the hearing. Quair,
20 359 F.Supp. 2d at 977-78. Because respondents offered
21 petitioners these protections at the 2004 rehearing, they claim
22 that this action is now moot.

23 Respondents are only partially correct. In his opinion,
24 Judge Coyle did not find that petitioners were entitled to only
25 these protections. Rather, Judge Coyle concluded that disputes
26 of material fact as to these protections were enough for
27 petitioners' claims to survive summary judgment. Judge Coyle
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1 did not decide or address whether ICRA, and in particular the
 2 rights to due process and a fair trial under ICRA, guaranteed
 3 petitioners additional protections. Therefore, the rehearing
 4 mooted only disputes as to whether petitioners received notice
 5 and had the right to confront hostile witnesses, not the entire
 6 suit.¹²

7 B. Petitioners' Motion

8 Petitioners allege that respondents violated ICRA per se
 9 and that no balancing of the Tribe's and the individual member's
 10 interests is appropriate. Petitioners contend that the Ninth
 11 Circuit has overruled its decision in Randall v. Yakima Nation
 12 Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988), and, therefore,
 13 that the balancing of interests analysis no longer applies.
 14 However, because the court finds that Randall has not been
 15 overruled, and because petitioners provide little analysis of
 16 the balance of interests, petitioners' motion will be denied.¹³

17 Under Randall and the cases following it, courts consider
 18 the tribal interest "in maintaining the traditional values of
 19 their unique government and cultural identity" when interpreting
 20 ICRA. Janis v. Wilson, 385 F.Supp. 1143, 1150 (D.S.D. 1974).

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 22 ¹² Respondents also make the argument that the court lacks
 23 "the ability to create a judicial tribunal or to impose upon the
 24 Tribe rules and procedures which mirror the principals of
 25 American jurisprudence for the purpose of resolving intra-tribal
 26 disputes related to membership." Because it has yet to
 determine whether respondents violated ICRA, the court declines
 to speculate as to the remedies it may order.

27 ¹³ In view of the court's conclusion that it lacks
 28 jurisdiction to review the disenrollment of petitioners, the
 court addresses petitioners' motion for summary judgment only as
 to the claims relating to banishment.

1 While § 1302 incorporates certain amendments from the Bill of
2 Rights, "the meaning and application of 25 U.S.C. § 1302 to
3 Indian tribes must necessarily be somewhat different than the
4 established Anglo-American legal meaning and application of the
5 Bill of Rights on federal and state governments." Id. "Where
6 the tribal court procedures under scrutiny differ significantly
7 from those 'commonly employed in Anglo-Saxon society,' courts
8 weigh 'the individual right to fair treatment' against 'the
9 magnitude of the tribal interest [in employing those
10 procedures]' to determine whether the procedures pass muster
11 under the Act." Randall v. Yakima Nation Tribal Court, 841 F.2d
12 897, 900 (9th Cir. 1988) (citations omitted). But courts need
13 not conduct this balancing test when "the tribal procedures
14 parallel those found in 'Anglo-Saxon society.'" Id.

15 Here, the court must weigh petitioners' interests against
16 the interests of the Tribe to determine the scope of
17 petitioners' rights under ICRA. The Tribe's adjudicatory
18 process is quite different from that followed in the common law,
19 Anglo-American tradition. For example, the tribal adjudicatory
20 body, the General Council, consisting of the entire membership
21 of the Tribe, has combined executive, legislative, and judicial
22 functions.

23 Petitioners make no argument based upon the Randall
24 balancing test. Rather, petitioners argue that respondents
25 violated ICRA per se because: (1) "the Tribe has absolutely no
26 written standards or procedures governing disenrollment or
27 banishment"; (2) the Tribe "fail[ed] to provide 'fair warning'
28 of proscribed criminal conduct"; and (3) "the General Council is

1 not a fair and impartial tribunal." In making these per se
2 arguments, petitioners make no showing that their individual
3 interests in these procedural safeguards surpass any
4 countervailing tribal interests.¹⁴

5 The premise of petitioners' per se contentions is that
6 Randall is no longer good law in the Ninth Circuit. According
7 to petitioners, the Ninth Circuit overruled Randall in Means v.
8 Navajo Nation, 432 F.3d 924, 935 (9th Cir. 2005), and found a
9 balancing of interests unnecessary because the protections in
10 ICRA are identical to those found in the United States
11 Constitution. Petitioners are incorrect. One panel of the
12 Ninth Circuit lacks authority to overrule another panel.
13 Moreover, in Means, the court likely concluded that a balancing
14 of interests was unnecessary because of the particular
15 circumstances in that case, most notably the critically
16 important factor that, unlike the Tribe here, the tribe involved
17 in the Means case, the Navajo Nation, uses an adjudicatory
18 system resembling that of the Anglo-American tradition. For
19 example, the Navajo Nation guarantees criminal defendants the
20 right to a jury trial and the right to counsel. Navajo Nation
21 Code tit. 1. Therefore, rather than overruling Randall, the
22 Means court, followed Randall, foregoing the balancing test

23
24 ¹⁴ Cases cited by petitioners do not support finding per se
25 violations. Petitioners cite many cases that interpret the
26 United States Constitution but not as applied to Indian tribes
27 under ICRA. They also cite to cases from other circuits in
28 which the courts were not bound by Randall, as the court is
here. Moreover, the tribes in the latter cases may use an
adjudicatory process similar to that in the Anglo-American
tradition, and, therefore, even under Randall, a balancing of
interests would have been unnecessary.

1 because of the nature of the Navajo Nation's adjudicatory
2 system.¹⁵ Such an approach is not appropriate here as applied to
3 a tribe with different traditions and customary procedures.

4 Moreover, petitioners allege that the resolutions banishing
5 them are bills of attainder, and, therefore, violate ICRA. A
6 bill of attainder is "a law that legislatively determines guilt
7 and inflicts punishment upon an identifiable individual without
8 provision of the protections of a judicial trial." Nixon v.
9 Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977). While the
10 General Council has executive, legislative, and judicial
11 functions, petitioners argue that the General Council was acting
12 as a legislative body when it banished them because it denied
13 them all the protections of a judicial trial. But petitioners
14 refer to protections common to Anglo-American judicial systems
15 and which ICRA may not require of Indian tribes that follow a
16 different model of adjudication. And here, the court has yet to
17 decide what protections ICRA guarantees petitioners under
18 Randall. By contending that the General Council is acting in
19 its legislative capacity only because it failed to provide these

21 ¹⁵ Petitioners seize on the following statement in Means as
22 overruling Randall: "the Indian Civil Rights Act confers all the
23 criminal protections on Means that he would receive under the
24 Federal Constitution, except for the right to grand jury
25 indictment and the right to appointed counsel if he cannot
26 afford an attorney." However, the court made this statement
27 without any indication that it meant to limit Randall or
28 fundamentally reinterpret Randall. Surely, if the Means court
intended such a reinterpretation, it would have said so. See
USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1294 (2d
Cir. 1995) (noting the principle that, when courts intend to
overrule clear precedent, they should do so in plain and
explicit terms).

1 protections, petitioners simply recycle their due process
2 arguments that they are per se entitled to these protections.¹⁶

3 III.

4 For the reasons above, the court DENIES petitioners' motion
5 and GRANTS respondent's motion on petitioners' claims relating
6 to their disenrollment.

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8 IT IS SO ORDERED.

9 Dated: May 18, 2007

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11 /s/ David F. Levi_____
12 DAVID F. LEVI
13 United States District Judge
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27 ¹⁶ Petitioners also argue that banishment violates ICRA
28 because it is cruel and unusual. Judge Coyle, however, found in
his 2004 order that the banishment of petitioners was not cruel
and unusual and already granted respondents partial summary
judgment on this claim. Quair, 359 F.Supp. 2d at 978-79.